

Nos. 191 and 192.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY,

Appellant,

VS.

HENRY F. SMITH ET AL.,

Appellees.

FILED

OCCIDENTAL & ORIENTAL STEAMSHIP COMPANY,

Appellant,

VS.

ELIZA A. SMITH,

Appellee.

OCT 13 1894

*Appeal from the District Court of the United States for the Northern
District of California.*

POINTS AND AUTHORITIES OF APPELLEES.

CLINTON L. WHITE, AND
WILLIAM H. COBB,

Proctors for Appellees.

Nos. 191 and 192.

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No. 191.

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Appellant,

vs.

ELIZA A. SMITH,

Appellee.

No. 192.

BRIEF OF APPELLEES.

(The references to pages of the record are to printed record in case 191.)

The above entitled actions were brought in the United States District Court pursuant to Sections 376 and 377, respectively, of the Code of Civil Procedure of the State of California, which provide that when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death.

The causes were tried in the District Court as Proceedings in Admiralty *in personam*, a stipulation having been entered into that all questions as to form of summons, etc., were waived (p. 27). On April 23d, 1894, decrees were entered in the District Court in favor of libelants, in Case No. 191, for \$10,000 and costs, and in Case No. 192 for \$1,000 and costs. From each of these decrees the Steamship Company appealed to this Court. The cases can be heard together.

On the morning of August 22d, 1888, the steamships *City of Chester* and *Oceanic* collided in the entrance of the Bay of San Francisco and the *City of Chester* was sunk, and a number of people were drowned, among others, Henry Smith and Myrta Smith, who were passengers on the *Chester*. Henry Smith was the husband of Eliza A. Smith and the father of the other appellees, and Myrta Smith was the infant daughter of Eliza A. Smith. The appellant was the owner of the steamship *Oceanic*, and the Pacific Coast Steamship Company was the owner of the steamship *City of Chester*. The latter company was made a co-defendant in

the actions, but availed itself of the " Limited Liability Act " and has been dismissed from the case.

The very able and exhaustive opinion of the District Judge who heard and decided the cases is contained at large in the record (pp. 316 to 365, inclusive). In that opinion the analysis of the testimony is so lucid, the conclusions properly deduced therefrom are so convincing, the statement of legal principles applicable thereto is so plain, and the citations of eminent authorities in support thereof are so pertinent and numerous, that we commend the opinion to the consideration of this Court as something which will be of more assistance in arriving at a correct decision of the cases than will be the briefs and arguments of counsel. In so doing, we desire to remind this Court that the District Judge heard the witnesses testify ; that there was some conflict in the testimony ; and it will be noticed that frequently the statements of a witness are modified or contradicted even by himself, in subsequent statements. In such cases the rule is that the view taken of the testimony by the lower Court is entitled to great weight. Thus, where the evidence was conflicting as to whether the steamer causing the collision reversed in time, it was held that the findings of the lower Court ought not to be disturbed. (*The Phoenix*, 58 Fed. Rep. 927.)

There is some conflict in the testimony which in some particulars would be difficult, if not impossible, to reconcile. This conflict results largely because of officers of the *Oceanic* testifying, in addition to facts, as

well to their conclusions that everything was done on the part of that ship that could be done, in prudence, to avert the collision. The opinions of these witnesses thus put in evidence ought to have little weight as against the facts testified to by them, with the rules of navigation applied thereto, and remembering the relation of the witnesses to the transaction. The language used by Judge Butler in the *John H. May*, 52 Fed. Rep. 883, is appropriate: "These witnesses are interested, swearing to exculpate themselves. I have yet to meet with an instance of collision where witnesses from the vessel in fault did not testify to a faithful discharge of their duties and to the faultlessness of the vessel." In thus calling attention to the testimony of the officers of the *Oceanic* we do not wish to be understood as questioning the honesty of intention of most of them, but insist that from the point of view which would naturally be taken by them and their desire to exculpate themselves, their *opinions* as to the meritoriousness of their own conduct are so warped as to be practically valueless. Besides, *the facts* testified to by these same witnesses do, as we will point out, fully establish the liability of the *Oceanic*. Counsel for appellant have embodied in their brief considerable testimony of officers of the *Oceanic*, and they have taken those parts most favorable to appellant. We submit that since they are interested witnesses striving to exculpate themselves and their actions on the occasion of the disaster, for that reason the testimony given by them in favor of appellees should control rather than what they say for appellant.

The collision was not the result of inevitable accident, which term, as applied to cases of this nature, is defined to mean "a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident." (The *Locklibo*, 3 Rob. Ad. 318; *Union SS. Co. vs. N. Y. etc. SS. Co.*, 24 How. U. S. 313.)

Taking into consideration the state of the weather, the place of collision, state of tide, the time of day, amount of fog, the smoothness of the water, the fittings of the two vessels, and all other facts and circumstances of the case, it is conclusively established that this collision was not the result of "inevitable accident," and that it might and would have been avoided by a proper degree of nautical skill and management on the part of these vessels.

It must be conclusively presumed that this collision was the result of gross mismanagement on the part of at least one if not both the ships. The appellant contends that such mismanagement and negligence was entirely on the part of the *Chester*, and that the *Oceanic* was free from blame. Without contending it to be conclusively shown that the *Chester* was entirely free from blame, the appellees do contend it to be fully established that the *Oceanic* was at fault. In fact, it is not at all necessary to the case of appellees to establish that the *Chester* was free from fault. If the fault was mutual, the *Oceanic* is liable. And since the case is not one of inevitable accident, the only defense the

Oceanic can contend for is that the *Chester* was solely at fault. There has been a decided failure in appellant's attempted proof on this point.

The accident was such as in the ordinary course of things does not happen if those who have the management use proper care, and this of itself affords reasonable evidence—in the absence of explanation from appellant—that the accident arose from want of ordinary care. The accident was such that its real cause may have been the negligence of appellant, and whether it was so or not was within the knowledge of appellant. In such cases the plaintiff furnishes the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that if defendant does not show where the negligence existed, the real cause was negligence on the part of defendant. (*Mullen vs. St. John*, 57 N. Y. 567; *Valkmar vs. M. R. Co.*, 134 N. Y. 420; *Scott vs. London Dock Co.*, 3 Hurl & C. 600; 1 *Shearman & Redfield on Negligence*, 4th Ed., Secs. 58, 59 and 60; *Cummings vs. National Furnace Co.*, 60 Wis. 612.)

It will be contended by appellant that the foregoing rule does not apply, because there were two parties to this transaction, and that it may well be presumed that the *Chester* and not the *Oceanic* was guilty of the negligence which caused the collision. But, when all the evidence is fairly considered, the doctrine of "*res ipsa loquitur*" fairly applies, because, in addition to mere proof of the collision, the evidence further establishes

that the *Oceanic* ran into the *Chester*—not the *Chester* into the *Oceanic*.

This last-mentioned contention is established by the relative positions of the two ships at the moment of collision. The ships came together almost at right angles—the bow of the *Oceanic* striking the port side of the *Chester* about twenty feet abaft her bow and cutting into her about ten feet (pp. 80, 107, 157, 202, 191, 185). Now ships do not have a lateral motion. Their powers of propulsion are either forwards or backwards.

The fact that the *Oceanic* ran into the *Chester* is further established by the condition and direction of the tide currents at the time and place of collision. The tide tended to carry the *Chester* not against the *Oceanic*, but either towards the north side of the channel or back into the harbor—or perhaps in an intermediate or northeasterly direction. In any view of the testimony, it tended to carry the *Chester* away from instead of toward the *Oceanic*.

That the *Oceanic* ran down the *Chester* is further and conclusively shown by the fact that the bow of the *Oceanic* cut half way through the *Chester*—a wound extending in not less than ten feet. The contention that the *Oceanic* was under sternway at the time of the collision is fully rebutted by the evidence showing with what force she struck the *Chester*. The evidence shows that the *Oceanic* had considerable headway at the time of impingement. (*Union SS. Co. vs. N. Y. SS. Co.* 24 How. U. S. 307.)

The contention solemnly advanced by the officers of the *Oceanic* that the *Chester*, by a crab-like method of locomotion, hurled herself sidewise against the bow of their ship is absurd, and would be amusing were it not advanced with some hope that the Court will accept such a theory of the disaster. The *Chester* was, at the time of the collision, headed in a direction substantially at right angles to the line of direction of the *Oceanic*, and the only two forces operating on the *Chester* were: 1st, her own propeller, which tended to carry her either forward or backward; and, 2d, the tide, which tended to carry her directly away from the incoming ship.

The collision occurred much nearer to the south than to the north shore. The fact that the collision occurred nearer to the south than the north shore is shown by a decided preponderance in the testimony of the witnesses. Those who testify that it was near the south shore are: Captain Wallace (pp. 184, 185, 187, 188 and 195); 1st Officer McCullum (p. 181); 2d Officer Lundine (p. 200); Assistant Engineer Comstock (p. 198); Clitus Barbour (p. 243); Mrs. Sarah Nye (p. 247); Mrs. Eliza A. Smith (p. 220), and J. Rankin (pp. 206, 208, 209). Those who testify that it was nearer to the north shore are: Pilot Myer (p. 94); Captain Metcalfe (pp. 108, 110); 1st Officer Tillotson (p. 257), and 2d Officer Bridgett (p. 278). And we again call attention to the fact that the latter are all interested witnesses, naturally desiring to exculpate themselves and the ship which was under their management. And on further

examination Pilot Myer substantially qualified his first statement on this point, and gave as his judgment that the disaster occurred about mid-channel (pp. 95, 96).

It is significant that although the officers of the *Oceanic* testify as to the direction taken by their ship in coming into the harbor, the location of the vessel at the time of taking this direction is a matter of great uncertainty. Pilot Meyer says: "I boarded the ship "about 8 o'clock A. M., *somewhere to the westward* of the "whistling buoy, and when the whistling buoy was "abeam bearing scuth southwest, in my opinion about "a mile to a mile and a half off, I changed the course "for the heads, which is *about* northeast by east." (p. 60). Capt. Metcalfe says: "He [the pilot] steered "the ship in for the whistling buoy, which we picked "up and passed it on the north side, *probably about a* "half a mile off" (p. 99).

Tillotson says:

"Q. Where did you pick up the pilot?"

"A. Close to the whistling buoy. *I heard it, but* "did not see it" (p. 252).

Bridgett says:

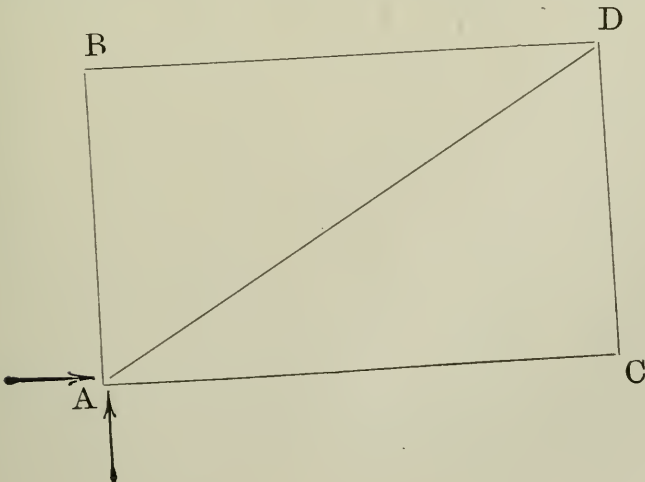
"We heard the whistling buoy, and the pilot then "shaped our course toward the North Heads. * * "The captain and pilot gave orders to look out for the "nine-fathom buoy, and requested the pilot to keep to "the north side of mid-channel. *We did not see the* "nine fathom buoy at all" (p. 273).

The fact that the collision occurred nearer to the south than the north shore is further shown by the fact

which appears undisputed, that the tide caught the *Chester* and carried her to the northward, and that this tide current, when the tide was like it was at the time of the collision, sets strongly from the south shore northerly to near mid-channel, or a little short of it, and then turns into the harbor. We call attention to the testimony of Captain Westdahl (pp. 209-18), Pilot Myer (pp. 94, 95), and Captain Metcalfe (p. 119). The *Chester* was under the influence of this tide current, and she would not have been if the collision had occurred within a quarter of a mile of the north shore.

The point where the wreck now lies also demonstrates that the collision occurred nearer to the south than to the north shore—that without regard to which point, that given by Westdahl, or by Whitelaw—is accepted as correct. For there were several forces which operated to finally deposit the wreck of the *Chester* at a point much to the northward (and, of course, to the eastward as well), of the place of collision. According to Captain Metcalfe the *Oceanic* was not coming straight in, but had her helm hard a-starboard, and was continuously turning toward the north shore (p. 108). Her direction, before changing her helm to hard a-starboard, had been NE., $\frac{1}{2}$ E. And he says the *Chester* headed to the north and had headway at the time of the collision (pp. 107, 156, 157). As the *Chester* was, at the time of the collision, going nearly straight across the channel, and the *Oceanic* was coming in with her helm hard a-starboard, and the point of collision was at the bow of the *Oceanic*, and near the

bow and on the port side of the *Chester*, the effect of the northerly direction of the *Chester* (which was helped strongly by the tide), would be to turn the *Oceanic* further toward the north. Whether or not the *Oceanic* had, at that time, any headway, she was, according to the evidence of defendant, given some headway immediately after the collision. (See testimony of Mirk, p. 291, and of Brolly, p. 294.) Taking the resultant of all these forces—the *Oceanic* heading NE. $\frac{1}{2}$ E. (p. 66), with helm hard a-starboard, the *Chester* nearly at right angles, or (p. 107) nearly NW. $\frac{1}{2}$ N., and the vessels striking their bows together and with the tide helping to carry them northward, and with some headway given the *Oceanic* before the *Chester* went down—the resultant of all these forces, we confidently claim, would be well illustrated by a line drawn from the point of collision to the resting place of the wreck, and the commencing point of this line, showing the point of collision, would be away to the southwest of the wreck, or but a short distance off from the Fort Point buoy. We illustrate by a “Parallelogram of the Forces.”



Let the point "A" represent the place of collision. Let the line "A B" represent the direction, and the length of the line the intensity of the two forces—the tide rip and the momentum of the *Chester*. Let the line "A C" represent the direction and length of the line the momentum of the *Oceanic*.

The resultant of these combined forces is not "A B" nor "A C," but the new line "A D," along which the two vessels would be carried during the six minutes which elapsed from the collision to the sinking of the *Chester*, and the point "D" is where the wreck will be found, which point will be quite a distance to the northward as well as eastward from the point "A," the point of collision.

Our contention that the collision occurred well in toward the south shore is further conclusively sustained by the testimony of the *Oceanic's* officers. When the first signal was given the *Oceanic* had already passed Point Diablo, and was a half mile away from the *Chester* (pp. 97, 116, 279, 154, 162). The *Oceanic* would, with her helm hard a starboard, turn completely around on a radius of one half a mile (pp. 134, 163). Now, if the *Oceanic*, with her helm hard a starboard, will turn entirely around in one mile of water, she will in one-half mile turn so as to be at right angles to her former position, and be substantially one-half mile in advance and one-half mile to the left of her former position. If then the *Oceanic* was but a quarter of a mile from the north shore, and was a half mile distant from the *Chester* when the first signal was

given, and immediately turned her helm hard a starboard, and kept it there until after the collision, the point of collision would have been up on the land of Marin county, about one-quarter of a mile north of Black Point. Or, if the helm of the *Oceanic* had been turned hard a starboard, as stated, she would in the run made have turned so much as to have been heading at the time of the collision in a direction fully at right angles to her previous course. It is plain that the *Oceanic's* helm was not placed and kept hard a starboard, or that she was all the time much further to the southward than contended for by the defense, or that the vessels were much nearer to each other than one-half mile when the first signal was given. It is, in fact, probable that all three of these matters were true.

As to the distance apart of the two vessels at the first signal, Capt. Metcalfe and his officers give it at one-half mile. This is naturally the extreme of their judgment. In fact, it was much less than that distance, and the vessels were in dangerous proximity to each other before any signal was given, as we will proceed to show from the testimony. The distances at the time of the first signal were from 600 to 800 yards, according to Officer Tillotson (p. 255). About two minutes' time elapsed between the first and the second signals (pp. 69, 118). The second signal was sounded, and almost immediately afterward the order was given to reverse the engines of the *Oceanic*. The engines had not been reversed two minutes when the collision occurred (pp. 289, 291, 293, 294). And the *Chester* was likewise, and for the same length of time, going

full speed astern (pp. 312, 197). The *Chester* before that had been at a speed of from five to six knots (p. 226). The pilot says the *Oceanic* was going at about three to four knots (p. 69). The combined speed at which the vessels were approaching each other then, at the time they gave the orders "full speed astern," was about ten miles per hour. This speed was surely reduced one half, or to five miles per hour, or one mile every twelve minutes, by the reversing of the engines, yet they collided in less than two minutes from the time of the second signal—showing either that the *Oceanic* was maintaining a much higher rate of speed than her officers are willing to admit, or that *the vessels were less than one sixth of a mile distant from each other at the time of the second signal*. In other words, the vessels were brought in such dangerous proximity before this signal was sounded that perfect accuracy of action on the part of the officers and machinery of both vessels was absolutely requisite to avoid a collision. To thus unnecessarily place two vessels in such proximity that only perfection of machinery and management on the part of both will avert disaster is highly culpable on the part of all engaged therein who have such control as to be able to order otherwise. This is especially true when it is remembered that they had and knew that they had a fog, a strong flood tide and a strong cross-current to contend with.

It is significant, also, that the *Oceanic* did not reverse even when in the dangerous proximity at the time of

the second signal, but awaited a little time longer—how long is uncertain—before any measures were taken to avert the disaster. The testimony is—as we will hereafter point out—that long before the order to reverse was given, the *Oceanic* had been brought into such close proximity to the *Chester* that the collision was a certainty.

We submit that the testimony, if it does not disclose the *Oceanic* to be alone culpable, does in any event show that vessel to have been equally at fault with the *Chester*. The equipments of both appear to have been reasonably and equally sufficient. Each had equal opportunities with the other to know the harbor and tide. Their opportunities to locate each other by hearing the fog signals were equal. The *Oceanic*, being in the fog bank, was, however, able to sight the *Chester* before the *Chester* could see the *Oceanic* (p. 192), and in this respect was in the better position.

The right of appellees to a decree for damages does not depend upon showing the management of the *Chester* to have been free from blame. If it be held that the vessels were meeting “end on,” then they both violated Art. 15 of the Revised Rules and Regulations for Preventing Collisions at Sea (U. S. Stats. 48th Cong. p. 441), and also Sec. 2360, Political Code, and Rule 1, Sec. 970, Civil Code of California.

“Art. 15: If two ships under steam are meeting “end on, or nearly end on, so as to involve risk of collision, *each shall alter her course to starboard*, so that each “may pass on the port side of the other. * * *.”

Sec. 2360, California Political Code, reads: "When steamers meet, *each must turn to the right*, so as to pass without interference." It will be noticed that this statute applies to all cases of steamers meeting, whether they meet "end on" or "on crossing courses."

Rule 1, Sec. 970, California Civil Code, reads: "Whenever any ship, whether a steamer or sailing ship, proceeding in one direction, meets another ship whether a steamer or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve the risk of a collision, *the helms of both ships must be put to port*, so as to pass on the port side of each other; and this rule applies to all steamers and all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, except where the circumstance of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to a due regard to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command."

It is worthy of note that a departure from the above rule is only allowable *when necessary in order to avoid immediate danger*—not when it may be merely a convenience.

In view of the definition of the term "end on," contained in the latter part of Article 15 of the Revised Rules, we are not prepared to contend that these vessels were meeting "end on," in the statutory definition

of that term, and only mention it here to show that under such assumption appellees would be entitled to recover, for the violation of a statute raises the presumption of negligence. (*Taylor vs. Harwood*, 1 Taney 444). And this rule is an exceedingly stringent one. (The Senff. 32 Fed. Rep. 237, Sec. 972 Cal. Civil Code). This presumption we will invoke in favor of appellees in another view of the case. The evidence discloses that the officers of the *Oceanic*, when that steamer was off Point Bonita, heard the fog signals of the *Chester* about two or three points on their starboard bow (p. p. 67-254). The *Oceanic* was in the fog (p. 109). As the *Chester* approached there was no apparent change in her direction (p. 67). And when from three to five minutes later (p. 68) the *Chester* loomed up out of the fog she was from two and one-half to three points on the starboard bow, and from a quarter to a half a mile away (pp. 68, 77, 93, 101, 113, 255, 258, 279, 296). Two or three minutes elapsed and the signal was again sounded (p. 69). And at the time of the sounding of the second signal of two blasts her angular direction was practically unchanged (p. 280). The *Chester* was then so headed that her masts and funnel appeared in line from the bridge of the *Oceanic*. The situation was such that Article 16 of the Revised Regulations was applicable: "If two ships under steam are crossing "so as to involve risk of collision, the ship which has "the other on her starboard side shall keep out of the "way of the other."

And Rule 5, Section 970, Cal. Civil Code: "When

“steamers must inevitably or necessarily cross so near
 “that by continuing their respective courses there
 “would be risk of collision, each vessel must put her
 “helm to port, so as always to pass on the larboard
 “side of each other.”

Both of the above statutes apply to the facts of this case, and, whether they can be reconciled with each other in all cases which might arise, they are strictly in harmony with each other under the existing facts here. The *Oceanic* had the *Chester* on her starboard side, and the *Chester* had, therefore the right of way, and it was the statutory duty of the *Oceanic* to keep out of the way of the *Chester*. And the steamers were crossing so near that by continuing their respective courses there would be risk of collision, and it was, therefore the statutory duty (of both) to put their helms to port and pass each other “port to port.” They elected, however, to violate these statutory rules and to attempt to pass “starboard to starboard” and a collision resulted. And it was the *Oceanic* that first elected to depart from the statutory rule of passing “port to port,” and hence took the risk of passing in safety and assumed all liability for failure so to do. And it makes no difference that the *Chester* assented to the proposal of the *Oceanic* and did what she could to co-operate. A case of like facts with this one on this point is that of *The Titan*, 49 Fed. Rep. 479. Whether or not, in a controversy between the two vessels as to which would be liable to the other, the assent of the *Chester* to the proposal of the *Oceanic* might be of im-

portance, it certainly cannot be so in this case, for their mutual arrangement to violate the rules will not excuse either ship from liability for the resulting death. It is a rule, constantly applied, that if the navigation of one vessel contrary to the statute produces embarrassment in the navigation of another, the violation of the statute will be held to be a contributing fault. (*The Clara*, 49 Fed. Rep. 768.)

It is urged by appellant that if the *Chester* had promptly taken the direction the *Oceanic* supposed she would take after the first interchange of signals, there would have been no collision. This may be true; but it appears absolutely certain that if both had obeyed the statute by placing their helms hard a-port instead of hard a-starboard, there would have been no collision. As it was, the keeping of their helms hard a-starboard, coupled with the effects of the tide, brought the vessels together. The evidence discloses that both vessels were aware of the condition of the tide, and they knew that at that time it sets so strongly across the channel from the south as to carry a vessel whose bow is caught in it, strongly to the north; and that in planning to pass each other they made no allowances whatever for the effects of this tide. This, in itself, was unseamanlike. A vessel proposing to pass another is in fault for not making allowances for the influences of the tide on the other. (*The Titan*, 49 Fed. Rep. 479.)

It was the duty of the *Oceanic* to keep away a sufficient distance to allow for any influence which the tide

might exert on the *Chester*. (*The Clara*, 49 Fed. Rep. 768; *The Fred Jansen*, 49 Fed. Rep. 256; *The Francis*, 44 Fed. Rep. 510.)

The evidence here discloses that both the captain (pp. 109, 119), and the pilot (pp. 94, 95), of the *Oceanic* knew of the condition of the tide, and of the fact that at that time a tide rip sets strongly from the south toward the north shore, or at least toward mid-channel, and that a vessel caught therein would probably be deflected from her course thereby (pp. 127, 129), yet, having such knowledge, no allowance whatever was made for the influence of this tide rip on the course of the *Chester*.

In fact, it would be inexcusable negligence for them not to know the state of the tide, and its tendency to carry a ship out of her course. (*The John H. May*, 52 Fed. Rep. 327). If the decisions on this point are followed, it must likewise be clear that where fully informed as to the tide, the vessel makes no allowance whatever for their well known influence, is still more culpable. Besides, it is the duty of vessels to keep out of the way of each other by a safe margin—having reference to all contingencies of navigation, and to unexpected contingencies, and even slight errors. (*The Aurania*, 29 Fed. Rep. 124–5. *The Ogemaw*, 32 Fed. Rep. 922). In the case of the *Aurania* the facts were not as strongly against her as they are against the *Oceanic*, for in that case the *Aurania* had the right of way, while in this case, as already pointed out, it was the statutory duty of the *Oceanic* to keep out of

the way of the *Chester*, the latter having the right of way.

The management of the *Oceanic* was grossly culpable from another point of view. She heard the fog signals of the *Chester* some three to five minutes before the latter hove in sight. These signals were from two and one-half to three points on the starboard bow. When the *Chester* hove in sight her angular direction was substantially the same, though the distance apart of the two vessels must have been lessened more than one-half. And at the time of the second signal the angular direction of the *Chester* from the *Oceanic* remained as before. All this ought to have warned the *Oceanic* that the *Chester* was on such a course that the highest degree of caution would be necessary in order to avoid disaster. Thus, where the whistle of the "S," as first heard from the "N," bore a point on the starboard bow, and was placed by the master of the "N" at a half mile away, and *there was no widening of the bearing of the "S's" subsequent whistles*, it was held that the "N" was at fault in failing to promptly stop and reverse. (*The North Star*, 62 Fed. Rep. 71).

A further and conclusive answer to the contention that if the *Chester* had taken the direction the *Oceanic* supposed she would take from her signal there would have been no collision, is that one steamer is not justified in relying upon the promise of another, in the face of her conduct to the contrary. (*The Gallileo*, 28 Fed. Rep. 473; *The Minnie C. Taylor*, 52 Fed. Rep. 323; *The Beryl*, L. R. 9 Prob. Div. 137;

The Dordogne, L. R. 10 Prob. Div. 6; *The Stanmore*, L. R. 10 Prob; Div. 135). The principles invoked in the cases last cited, when applied to the facts developed by the evidence in this action, fully establish that the *Oceanic* was guilty of negligence, and of a violation of Articles 16 and 18 of the Revised Rules and Regulations, and likewise Rule 3 promulgated by the Supervising Inspectors. Article 16 has been already quoted. Article 18 reads: "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary." Rule 3 of the Supervising Inspectors is found at page 81 of the Reporter's Transcript.

In discussing Article 16, the Court in *The Beryl* says: "If the circumstances of those two ships which are under steam are such that the persons in charge of them ought to see that risk of collision is involved, the ship which is on the starboard side is bound to do something to keep out of the way of the other. Another rule of interpretation of these Regulations is (the object of them being to avoid risk of collision) that they are all applicable at a time when the risk of collision can be avoided—not that they are applicable when the risk of collision is already fixed and determined. We have always said that the right moment of time to be considered is that which exists at the moment before the risk of collision is constituted. The words are not 'if two ships under steam are crossing with a risk of collision,' but 'are crossing so as to involve risk of collision,' that is the moment be-

“fore there was a risk of collision.” Did those in charge of the *Oceanic*—having the *Chester* on her starboard side, and hence obligated to keep out of the way—do anything to keep out of the way as soon as they saw, or ought to have seen, that risk of collision was involved? On the contrary at that time they contented themselves with watching the *Chester*, and signalling to her to do something, themselves in the meantime going recklessly forward to disaster. And when they finally did act, it was after the risk of collision had become an absolute certainty, and when the only result their action could have would be to mitigate to some degree the dire results which had become a certainty. We assert, without fear of successful contradiction, that the evidence discloses that the *Oceanic* did not act as promptly as she should have done, and that the uncertainty in the course of the *Chester*, and the risk of collision involved thereby was apparent and fully recognized from the *Oceanic* long before any action was taken to avoid the risk. We quote some of the testimony on this point, and desire the Court to remember that it came from witnesses desiring to exculpate themselves, and hence to sustain the course pursued by the *Oceanic*. Pilot Myer, at page 63, says:

“I said ‘Now is the time to give him two distinct whistles to tell him we will starboard; he is now on our starboard bow; he is going this way; so that he may put his wheel to starboard and clear us.’ He answered directly with two distinct whistles. At the time we saw the loom of him in the fog coming to-

“ward us—*pointing toward our midships*—and the hull
 “came out plainer and plainer. He *seemed to be mov-*
 “*ing a little bit to starboard.* It was only for a moment
 “or two. She seemed to be under the influence of her
 “port helm. I sang out ‘Give him two more whis-
 “tles.’ These two whistles were blown and he
 “answered them again, but instead of the ship answer-
 “ing the helm as it seemed—I don’t know whether
 “there was something in the way—he came as under
 “a port helm, coming this way, *right toward us.* I said
 “to Captain Metcalfe ‘There will be a collision as sure
 “as can be. I don’t see how he can miss us. Put
 “your engines full speed astern.’ We were going then
 “at the rate of not more than from three to four knots.
 “We put the engines full speed astern.”

Again at page 64 :

“After the first whistle, when she hove in sight, *we*
 “*did not see that she moved under her starboard helm as she*
 “*ought to,* and we gave her another two blasts of the
 “whistles, and she answered again with two blasts of
 “the whistle. *Then he did not move to starboard, as he*
 “*ought to have done.* As soon as I saw she moved this
 “way we went full speed astern.”

Again on page 71 :

“Q. How long was it from the time you sounded
 “the second whistle until you gave the order to re-
 “verse?”

“A. It was the same time; no time elapsed; when
 “I gave the second whistle; about half a minute; I
 “said immediately.”

Again on page 72 :

“ Q. Why did you sound that second signal ? ”

“ A. To make sure that he would starboard a little
“ more.”

“ Q. Then *when she did signal you that she would starboard, did you wait at all to see whether she would or not?* ”

“ A. *I could see that she did not ; then I reversed*
“ right away.”

Again, on page 74 :

“ Q. At the time that you sounded the second signal to the *City of Chester*, and got her reply, did it
“ look to you as if there was any risk of a collision ? ”

“ A. *After she had sounded I knew she could not clear*
“ us.”

“ Q. You knew she could ? ”

“ A. *She could not ; she could not clear us, because*
“ she was under, as it appeared, port helm instead of
“ starboard.”

“ Q. I want to ask you once more, why did you
“ sound that second signal to the *City of Chester* ? ”

“ A. Because his first signal was answered, but not
“ obeyed.”

“ Q. After the first signal *was answered, but not*
“ *obeyed, and you saw the Chester, there was such uncer-*
“ *tainty in her movements that you did not know what she*
“ *was going to do, is that so ?* ”

“ A. *That is what it was.* ”

“ Q. So that you sounded the second signal in order
“ to verify the first one ? ”

“ A. *That is correct.* ”

On page 89 :

“ Q. *Do you mean to tell us that there was but one thing that would have saved the ship from colliding with you after you first saw her, and that was that she should obey her starboard helm ?* ”

“ A. *Certainly.* ”

“ Q. *That was the only thing that would prevent a collision from the time you first saw her ?* ”

“ A. *Yes, sir.* ”

“ Q. Then from the time you first caught sight of the *Chester* you felt that there would be a collision unless she went to port ? ”

“ A. *Yes, sir.* ”

“ Q. Unless she obeyed her starboard helm ? ”

“ A. *Yes, sir.* ”

“ Q. Is that right ? ”

“ A. *Yes, sir.* ”

“ Q. If that was the condition of affairs, why did you sound that second signal ? ”

“ A. Because she did not go that way. ”

On page 91 :

“ Q. *After you had watched her long enough to see that she was not obeying the signal, you went full speed astern, is that right ?* ”

“ A. *That is right ; that is what I said a little while ago.* ”

On page 93 :

“ Q. As I understand, you say when you saw the *City of Chester* a half a mile away, and some three points on your starboard bow, that nothing could

“avert the collision or disaster except her turning to starboard?”

“A. That is what it is.”

In other words, the pilot discloses that the *Oceanic* placed herself in such a position that from the time of first sighting the *Chester* she was dependent entirely upon the latter vessel to avert disaster. Yet for two minutes more she came recklessly onward at a good rate of speed, and then contented herself with repeating the signal to starboard, waiting a little longer to see whether the *Chester* would do so, and then—when the collision was inevitable—attempted to take some measures to avert it.

We quote some of the evidence of Captain Metcalfe on the same question. On page 101:

“Looking carefully on the starboard bow, which was the place we heard the signal of the out-coming steamer, I saw a dark mass of a hull looming up through the fog, about two and one-half points on the starboard bow, $2\frac{1}{2}$ or 3 points. I said to the pilot at that time. ‘there is that craft.’ He said, ‘blow two blasts.’ The second officer at the wheel blew two whistles, and our helm was put hard a-starboard at the same time. The ship, not having much way on her, turned gradually and slowly to port. Soon after that, watching this ship carefully, he answered these two signals given him. Two blasts of the whistle meaning ‘pass me on the starboard side,’ to which we received an answer. If the ship had acted on that starboard helm, there is no reason why she should

“have passed any nearer than a quarter of a mile of
 “us. Watching him carefully, we saw there was little
 “or no indication of him acting on the starboard helm,
 “and the whistles were repeated and were answered
 “again. *Immediately after, seeing that there was no indi-*
 “*cation of the ship acting on the starboard helm,* I said to
 “the pilot: ‘What the devil is that fellow doing?’ I
 “had my hand on the telegraph at the time; I rang
 “the telegraph ‘Full speed astern’ as hard as I could,
 “at the same moment I sung out ‘full speed astern,’
 “and then I was watching the two ships carefully, be-
 “cause we went full speed astern before we struck the
 “*City of Chester.*”

On page 102 :

“At the moment the two ships came together the
 “*Chester* had considerable way on her. *We saw no in-*
 “*dication of her answering her starboard helm,* or obeying
 “*the signals* mutually agreed upon between us. About
 “the time of the second signal, or very soon after, we
 “could see the ship swinging rapidly, as if under a
 “strong port helm, and the *Chester* having considerable
 “way on her, came across the *Oceanic*’s bow; for some
 “little time it looked as if the *Chester* might run into
 “the *Oceanic*. *I simply waited developments* in order to
 “give the necessary orders if she struck the *Oceanic*,
 “or got across our bow.”

On page 110:

“Q. Why did you sound that second signal to ‘star-
 “board’ to the *Chester*?”

“ A. Because we saw he was not acting according to his answer to the first.”

“ Q. What was it given for ?”

“ A. To verify the first.”

“ Q. After having received his second signal, did you wait at all to see whether or not he was obeying it ?”

“ A. No, sir; because about that time we could see him swing rapidly, as if acting on a port helm. I said to the pilot, ‘what the devil is he doing?’ and swung the telegraph ‘full speed astern.’ ”

“ Q. Did not the pilot, in answer to your question, say immediately, ‘He has answered our signal; if he obeys it it is all right?’ ”

“ A. That was the first signal. He said, ‘he has answered our signals; that is all right.’ It would have been if the ship had acted in accordance with it.”

“ Q. *After the first signal there was something that indicated to you that he was not starboarding before you gave the second?* ”

“ A. *Certainly.* ”

“ Q. Then you gave the second ?”

“ A. Then we gave the second.”

On page 112 :

“ Q. You heard his signal agreeing with you to go to starboard, and at the same time your sight indicated that he was going to port, did it not ?”

“ A. *After the first signal he did nothing. The ship seemed to come straight ahead, therefore we repeated the signal.* ”

On page 113 :

“Q. How soon after the first signal from the *Chester* did you get sight of her?”

“A. *I myself had sight of her when the first signal was given.*”

“Q. What direction did she appear to be taking at the time.”

“A. *I know she was coming end on to us, 2½ or 3 points on our starboard bow. * * * The sight indicated that he would run into us if he did not carry out the signal we gave him, which he answered.*”

On page 118 :

“Q. How much time elapsed, as nearly as you can tell, between your first and second signals to the *Chester* to starboard the helm?”

“A. *Probably two minutes, as near as my memory will serve now.*”

“Q. I will ask you whether there was any way that you could have avoided the collision if the steamer *Chester* had kept what was her apparent course at the time that you first saw her?”

“A. If she had maintained the course she was steering when we first saw her, the chances are that if we had gone full speed ahead we might have crossed her bow.”

On page 128 :

“Q. Did you make any allowance in your arrangements for passing the *Chester* for the sheer that this tide would give her?”

“A. I most certainly did not.” * * *

“Q. You relied upon the *Chester* entirely on that question?”

“A. I relied upon the seamanship of the captain of the *City of Chester* carrying out the whistle signal that we had each given and answered.”

On page 131:

“Q. Did you give the matter of the *Chester* being caught in the tide any consideration whatever?”

“A. *I do not think I did. I left that for the captain of the Chester.*”

On page 144:

“Q. Between the time you discovered that she was not doing what she had agreed to do, and your sending your ship full speed astern, how much time elapsed?”

“A. Not more than half a moment, [minute?] less.”

“Q. Was it any more than was necessary to enable yourself and Pilot Myer to locate and recognize the fact that she was not doing what she had agreed to do?”

“A. *Just sufficient time in our judgment to see that the ship was doing exactly opposite to what she had agreed to do. The only course then was to go full speed astern.*”

On page 155:

“Q. As I understood you all through, the direction [*i. e.*, of the *C.* from the *O.*] did not change substantially up to the time of the second signal—

“that is, so far as the number of points were concerned?”

“A. Not a great deal, no sir?”

“Q. *The position was such at the time of the second signal as if the Chester had simply advanced along the line toward the Oceanic.*

“A. Yes, sir.

We also quote from the testimony given by First Officer Tillotson :

On page 256 :

“Q. When was any change made in her [*Oceanic's*] movement with reference to going astern?”

“A. *After the second two blasts were given, and did not appear to be responded to by the approaching steamer.*”

“Q. The blasts were responded to, were they not?”

“A. *But the course of the ship did not correspond with the signal given.*”

On page 258 :

“Q. At the time you first saw the *Chester* what appeared to be her position toward the *Oceanic*?”

“A. She was coming at an angle of about $2\frac{1}{2}$ to 3 points on the starboard bow.”

“Q. What direction was the *Chester* taking, or could you tell?”

“A. She was taking the direction to come in $2\frac{1}{2}$ points from ahead of the *Oceanic*.”

“Q. Was she coming toward the *Oceanic*?”

“A. *She was standing over towards the Oceanic, crossing ships.*”

On page 259 :

“ Q. *At the second time that your attention was called to the Chester had her position changed any—her direction from the Oceanic?* ”

“ A. *Apparently not.* ”

“ Q. *Were the vessels nearer together?* ”

“ A. *Considerably nearer.* ”

“ Q. *But her apparent direction from the Oceanic was substantially what it was at the first signal?* ”

“ A. *I should imagine so.* ”

On page 260 :

“ Q. *Between the first and second signals did it appear to you that the distance between the Oceanic and the Chester had broadened?* ”

“ A. *Between the first and second signals?* ”

“ Q. *Yes.* ”

“ A. *Had broadened?* ”

“ Q. *Yes.* ”

“ A. *No sir.* ”

On page 262 :

“ Q. *Was there long enough time elapsed from the time of the sounding of the second signal up to the time of the engines going full speed astern to notice whether or not the Chester was obeying that second signal?* ”

“ A. *There was ample time to notice whether she was obeying it. I understood you asked me, was there time for me to see that she had answered?* ”

“ Q. *Time for you to observe that she did not obey her helm?* ”

“A. Yes, sir.”

“Q. I do not know that you understand the question. I want to know *whether between the time that the second signal was sounded and answered, and the time that the Oceanic's engines went full speed astern, was there time to see whether the Chester obeyed that signal and went to starboard?*”

“A. Yes, sir.”

“Q. Then when it was seen that she did not obey the signal and go to starboard, the engines of the *Oceanic* went full speed astern?”

“A. Yes, sir.”

We quote from the testimony of Second Officer Bridgett:

On pages 274 and 275:

“We passed Point Diablo. Just after doing so we heard the whistle of a steamer, which appeared to be coming out. Everybody's eyes were attracted in that direction. Just after hearing her whistle two or three times the ship appeared. The pilot gave the order to blow two blasts and the helm to be put hard a starboard. * * * The Captain said to the pilot: ‘That is all right; she has answered our whistle.’ *Still watching her, the Captain said: ‘She does not seem to answer her rudder,’* and the pilot said, ‘No, blow two whistles again,’ which was done. She answered both whistles each time. The Captain then said: ‘Full speed astern,’ and he worked the telegraph himself.”

“Q. How long a time elapsed between the blow-

“ing of the last two whistles and the order to go full speed astern?”

“A. Almost immediately. *The vessel came along, acting as though she was under the influence of her port helm; she came right along, and struck the Oceanic right in the bow.*”

On page 276 :

“Q. At what distance from the *Oceanic* was the *Chester* when you first saw her?”

“A. A half a mile.”

On page 279 :

“Q. How many points off your starboard bow was the *Chester* when you first saw her?”

“A. Two and one-half to three points.”

“Q. And about a half mile distant?”

“A. Yes, sir.”

On page 280 :

“Q. *What direction did she appear to be heading at the time the first signal was sounded?*”

“A. *Right for the bridge of the Oceanic; may have been a little bit abaft of the bridge.*”

“Q. *What direction did she appear to be heading at the time of the second signal?*”

“A. *The same direction.*”

“Q. Appeared to be heading toward the bridge of the *Oceanic*?”

“A. Yes, sir.”

“Q. How much nearer was she; *what distance were the ships apart at the time the second signal was sounded?*”

“ A. About a quarter of a mile ; may be less.”

“ Q. That is, between the first and second signals the ships have covered about half the distance that was between them ; is that right ?

“ A. Yes, sir.

The testimony which we have thus quoted is from those witnesses upon whom the defendant relies to be cleared from liability. This testimony is that the *Oceanic* knew with reasonable certainty, by reason of the fog signals, the position of the *Chester* before the first signal of two blasts was given. She knew that the direction did not broaden on nearer approach, and that therefore the *Chester*, instead of going to port, was continuously turning to starboard, so that she constantly pointed toward the bridge of the *Oceanic*. Their sense of hearing disclosed to the officers of the *Oceanic*, before the *Chester* appeared out of the fog, that the latter ship was crossing the *Oceanic*. And later their sense of sight disclosed that the *Chester* was running them down.

It would necessarily be conceded that if from the time they first heard the *Chester* until it was absolutely too late to avoid a collision, the pilot and captain of the *Oceanic*, although obeying the signal agreed upon, had resolutely shut their eyes to the movements of the *Chester*, their conduct would have been the most glaring negligence. They did worse than the supposed case, however, for they kept their eyes open and watched the course of the *Chester*, and deliberately allowed her to approach so near and take such position

that collision was inevitable, before they took any measures to avert it. They all substantially agree that at the time of the second signal they had approached so near to the *Chester* as to be unable themselves to take effective action. They came on, trusting not to their own judgment, skill and seamanship to avert disaster, but having blind and misplaced confidence in the promise of the other vessel, in the face of her conduct directly the contrary of her promise, a conduct plainly and continuously before their view from the time of and even before the first signal. They were bound to see, and they did see that the *Chester*, instead of obeying the signal, and turning to the left, was moving in an opposite direction, or, at least, was heading directly, and, as they say, with considerable speed toward their ship. They saw that notwithstanding the promise of the *Chester* to pass "starboard to starboard," she was doing nothing of the kind, or at least was so tardy in her movements that the situation was growing critical. Were they justified in thus relying upon the promise of the *Chester*, in the face of her conduct to the contrary? "The language of the Twenty-first [now Article 18] Rule is imperative and plain. It applies from the moment when the approach of vessels is such as to involve risk of collision between them. In *The Beryl*, 9 Prob. Div. 137, the Court, in considering the English statute, which is in language identical with ours, says that 'the right moment of time to be considered is that which exists at the moment before the risk is constituted.' The rule does not permit the calcula-

“tion of chances and the weighing of probabilities, “because risk intervenes the moment this becomes “necessary; and it certainly cannot be material whether “the risk depends upon the contumacy of the other “vessel, or her supineness in fulfilling her obliga- “tions, or the probability that she will perform her “duty, or upon circumstances quite independent of “such chances.” (*The Galileo*, 38 Fed. Rep. 473.)

We commend to the consideration of the Court the case of the *Khedive*, L. R. 5 Ap., cases 876, and particularly the evidence given in detail at pages 885 and 886. The case in its facts appears very much like the one before this Court. The vessels were approaching “green to green,” and were at first on parallel courses, the *Voorwaarts* about 3 points off the starboard bow of the *Khedive*. Then, at the distance of about three-quarters of a mile, the *Voorwaarts* suddenly ported. The *Khedive* immediately went hard a-starboard, and about a minute later went full speed astern. The engines were going full speed astern a minute and a half before the collision occurred, and were going astern at the time of the collision. The decision—and it is from the House of Lords—holds the *Voorwaarts* to have been grossly at fault, but that the *Khedive* was also liable, for the reason that she did not stop and reverse until the risk of collision had become a certainty of collision. That having violated a statutory rule the burden of proof was on the *Khedive* to show that her failure to sooner stop and reverse did not contribute to the disaster, the presumption being that it did so con-

tribute. The case before this Court is stronger against appellant in its facts, for here the vessels were at no time on parallel courses, but the *Chester* came directly toward the *Oceanic* (at first gradually swinging to starboard, so as to point continuously toward the bridge of the *Oceanic*), until after the second signal, when being caught in the tide, she seemed to be acting on her port instead of her starboard helm. The burden of proof was on the defense to show that the failure of the *Oceanic* to reverse more promptly did not contribute to the disaster. The defense has contented itself, however, by claiming that the disaster could have been averted by different conduct of the part of the *Chester*, and avoided opportunity to show the probable effect of an earlier reversal of the engines of the *Oceanic*, though such opportunity was afforded. (See the answers of Capt. Metcalfe, pages 118 and 119 of the record). Yet the rule is well established that errors, committed by one of two vessels approaching each other from opposite directions, do not excuse the other from adopting every proper precaution required by the circumstances to prevent collision. (*The Louise*, 52 Fed. Rep. 888.) And if there is any uncertainty as to the intentions of the approaching vessel, this of itself calls for the closest watch and the highest degree of diligence on the part of the other with reference to her movements, and it behooves those in charge to be prompt in availing themselves of every resource to avoid, not only the collision, but the *risk of such a catastrophe*. (*The Manitoba*, 122 U. S. 108.) The case

of *The Manitoba* was one where the positions of the vessels were as they were in our case—approaching each other “green to green,” and on slightly converging lines, which was apparent to the officers of both vessels for considerable time before the *Comet* ported her wheel. On these facts the Supreme Court held that the *Manitoba*, in addition to being in fault for not signaling, and in not slowing up, was also in fault in failing to reverse her engine until it was too late to accomplish anything thereby.

Were the circumstances in this case such as to invoke the rule that would require the *Oceanic* to stop and reverse before she actually did so? The fact was observed by the Captain of the *Oceanic* that notwithstanding their mutual advance and his own change of helm, the *Chester* still continued to approach his starboard bow with unaltered bearing, indicating that the two vessels were approaching each other on intersecting lines, and that unless there was a change in the bearing of the *Chester* the vessels would, as a matter of mathematical certainty, meet at the point of intersection. Under these circumstances, his continuing to advance when he knew, or ought to have known, that in spite of his own starboard helm the *Chester* was coming nearer, without any appreciable change of bearing, was a violation of the second part of Article 18, for it was necessary to stop and reverse in order to avoid not collision, but *risk of collision*. In broad daylight it is necessary for two approaching steamers to stop and reverse whenever it becomes apparent to the

eye that if they continue to approach they will in all likelihood either shave close or collide. (See *The Ceto*, L. R. 14 App. Cas. 688 and 686 ; *The Bristol*, 11 Fed. Rep. 156). The testimony of the officers of the *Oceanic* is that that steamer positively had no way on her at the time of the collision. If, therefore, they had reversed at an earlier point of time—at the time when they were blindly rushing into danger, relying solely upon the promise of the *Chester*, in the face of her conduct directly to the contrary of her promise—it is a moral certainty that there would have been no collision.

“The rules of navigation were ordained to prevent collisions, and to preserve life and property embarked in a perilous pursuit, and not to enable those whose duty it is to adopt, if possible, the necessary precautions to avoid such a disaster to determine how little they can do in that direction without becoming responsible for its consequences in case it occurs.” (*The America*, 92 U. S. 432.) The maritime law is rigid in exacting unremitting vigilance and care on the part of those entrusted with the navigation of vessels to avoid accidents by collision. Any negligence, inattention, or want of skill will result in responsibility. (*Ward vs. Ogdensburg*, 5 McLean, 622).

We desire to revert again to the contention of the *Oceanic* that she had a right to ignore the tide rip as a factor, and to rely upon the promise of the *Chester* to not be influenced in her course by such tide rip. We have already quoted authorities showing it to have

been the duty of the *Oceanic* to have made proper allowances for the influence of that tide rip on the course of the *Chester*. We now call attention to the fact that the *Oceanic* had no right to rely upon the promise of the *Chester* to overcome, without swing, the influences of the tide rip, for the reason that the *Chester* made no such promise. She did not promise to cut through that tide rip on a straight line, nor to be uninfluenced thereby. All that she did promise by her signals was to turn to the left as best she could under influence of all the factors and contingencies to be dealt with. Her reply to the signals of the *Oceanic* meant: "I will put my helm hard a-starboard as you request, but we must both make proper allowances for the contingencies of navigation and the influence of our surroundings. Keep far enough to the north so that the tide rip, which we both know about, will not throw me against you." The *Oceanic* was negligent in not making such allowances.

Suppose the fact to have been that instead of there being a tide rip, which would carry the *Chester* to the right, there had been a promontory extending into the channel, or a rock, which she would necessarily have to avoid, the argument of appellants would be that the *Oceanic* could presume that the *Chester* would run over the obstruction, instead of going around it. It is claimed by appellant that Supervising Inspectors' Rule 3 has no application to this case, because the two steamers had no misunderstanding of each other's signals. The rule is, however, on the condition that if

the pilot of either vessel fails to understand *the course* or *intention* of the other, whether from signals given or answered erroneously, or *from other causes*. It is plain from the evidence that the course of the *Chester*, as apparent to the sense of sight, was not at any time in harmony with her intention, as indicated to the sense of hearing, by her answer to the signals.

Nothing could be better calculated to cause the pilot to fail to understand the course and intention, than to have his sense of sight tell him one thing with positiveness, and his sense of hearing, with like positiveness, assert directly the contrary. If the course of the *Chester* was to starboard, instead of to port, then the signal was answered erroneously, and the pilot could not understand her course or intention from such erroneous signal. It will be noticed, too, that Rule 3 comes in force when there is a failure to understand the course or intention of the other vessel from *any other cause* as well as from erroneous signals. It was held in *The Britannia*, 34 Fed. Rep. 555, that Supervising Inspectors' Rule 3 applied in a case where a signal had been agreed to to go astern, but there was uncertainty from the action of the vessel whether she would after all do so, or go ahead, or collide, and the pilot contented himself with repeating his original signal.

The rate of speed maintained by the *Oceanic* was a gross violation of Article 13, of Act of March 3, 1885, which is that, "Every ship, whether a sailing ship or "a steamship, shall, in a fog, mist, or falling snow, go at a moderate speed." We call attention to the decis-

ion on this point, made by the District Court, and found at pages 345 to 348, inclusive, of the record: The finding is—and it is fully sustained by the evidence—that the *Oceanic* was maintaining a speed of more than $10\frac{3}{4}$ knots per hour (p. 346). Of this from 2 to 3 knots was from the effect of the tide (p. 345), so that the *Oceanic*, instead of coming in “dead slow,” was making actual progress through the water of 8 knots per hour. Five miles per hour in a fog is not a moderate speed. (*The Martello*, 34 Fed. Rep. 71). Seven knots in a dense fog, in a much frequented highway of commerce, is not a moderate speed, although the vessel nearly stopped before striking the other vessel. (*Leonard vs. Whitwell*, 10 Benedict, 638). A steamer moving against the tide in a fog, in a narrow channel, at the rate of five and one-third miles per hour, held liable for the collision. (*The Luray*, 24 Fed. Rep. 751). Four or five knots an hour is not a moderate speed for a steamer in a fog. (*The Magna Charter*, 25 Law Times (London) N. S. 512). It is faulty navigation for a vessel to continue her course at a rate of speed of over five miles per hour in a dense fog, and where other vessels are liable to be encountered. (*The Raleigh*, 31 Fed. Rep. 527). A steamer proceeding in a fog, and hearing a fog horn on her bow, indicating the approach of another vessel in a course crossing her own, is bound immediately to stop until, by repeated blasts of the horn, she can assure herself of the exact bearing course and distance of the approaching vessel. (*The Martello vs. The Willey*, 14 Sup. Ct. Rep. 723, 1894).

We contend that it is established by the evidence :

1. That the *Oceanic* came in on a line south of mid-channel.

2. That she came at an immoderate rate of speed.

3. That the ships in electing to pass "starboard to "starboard" violated Section 970 of the Civil Code.

4. That they violated Section 2360 of the Political Code.

5. That, the *Chester* having the right of way, the *Oceanic* violated Article 16 of the "Revised International Rules for Preventing Collisions at Sea," act of March 9, 1885.

6. That the *Oceanic* violated Article 21 of the Revised Rules.

7. The *Oceanic* violated Article 18, which provides :
 "Every steamship, when approaching another ship so
 "as to involve risk of collision, shall slacken her speed,
 "or stop and reverse, if necessary."

8. The *Oceanic* violated Rule 3 of the Rules adopted by the Treasury Department of the United States Government for the steerage of vessels. This Rule reads : "If, when steamers are approaching each
 "other the pilot of either vessel fails to understand
 "the *course or intention* of the other, whether from signals being given or answered erroneously, *or from*
 "*other causes*, the pilot so in doubt shall immediately
 "signify the same by giving several short and rapid
 "blasts of the steam whistle ; and if the vessels shall
 "have approached within a half a mile of each other
 "both shall immediately be slowed to a speed barely

“sufficient for steerage way until the proper signals
“are given, answered and understood, or until the
“vessels shall have passed each other.”

It is not a part of our case to prove the *Chester* to have been free from blame. We submit, however, that the evidence does not disclose so much fault in her as can be imputed to the *Oceanic*. Her appointments, gearing, steering apparatus and machinery were in every respect sufficient. She had her full complement of competent officers and crew. She went out slowly, feeling her way through the fog. She sounded fog signals as required by the rules. She took the course usually taken by outwardbound craft. The *Oceanic* asked her to violate the statutory rule of passing “port to port,” and she assented. She suddenly sees the *Oceanic* loom up in front of her and on the *south side of the channel*, and she then promptly reverses, goes full speed astern, and does all in her power to avert the disaster. Her conduct appears less blameworthy than that of the *Oceanic*, for the latter, desiring to come in on the north, is found on the south side of the channel, and the latter is the vessel which first proposes a violation of the statutory rules for the passing of vessels. The *Chester* promptly reverses as soon as she catches sight of the *Oceanic*, while the *Oceanic* watches the *Chester* for upward of two minutes after sighting her, and does not reverse until the “risk of collision” is no longer a *risk*, but is a foregone conclusion. The doctrine of comparative negligence has, however, no application to the case. The management

of the *Chester* may have been criminally negligent, while the *Oceanic* was guilty of a comparatively venial fault, yet the *Oceanic* would be liable. (*The Arratoon Apar*, L. R. 15. App. cases 37). Thus delay in signaling, and in reversing, are proper grounds for holding a vessel liable, though the management of the other vessel was grossly improper. (*The A. Crossman*, 58 Fed. Rep. 808). Nor can it be claimed that any contributory negligence on the part of the *Chester* can be imputed to a passenger thereon. (*Little vs. Hackett*, 116 U. S. 366; *The Bernina*, L. R. 12 Prob. Div. 58).

In scrutinizing the actions of appellant with reference to this deplorable accident, we submit that it is the duty of the Court, in the consideration of this case, to keep in view the stringent obligations which have been placed upon navigators, in order to avoid collisions at sea, "which the Courts will never relax." (*The Seuff*, 32 Fed. Rep. 237).

The rule applicable, and by which the conduct of appellant is to be judged, is one of the most stringent that is applied to the affairs of men. A vessel will be held liable unless the closest watch, the highest degree of diligence, the most prompt measures, and the use of every resource at command has been availed of, not only to avoid collisions, *but even risk of collision*. (*The Manitoba*, 122 U. S. 108).

The maritime law is rigid in exacting unremitting vigilance and care on the part of navigators to avoid accidents by collision. Any negligence, or inattention,

is sufficient upon which to base the liability. (*Ward vs. Ogdensburg*, 5 McLain C. C. 622).

Slight error or omission is sufficient to make the defendant liable, though the other vessel be grossly or even criminally negligent. (*The Arratoon Apar*, L. R. Ap. Cas. 37).

We again call attention to the above rule, and to the authorities sustaining it, for the reason that this case is controlled thereby, and because counsel for appellant have in their brief persistently insisted upon the Court taking a much more liberal view of the obligations imposed upon their client. We invoke the rule because it is strictly applicable to the facts of the case—because the captain of the *Oceanic*, standing on the bridge of that vessel, saw the *Chester* when she was a half-mile distant, saw that she was headed directly toward the *Oceanic*, saw that as the distance between the vessels was shortened, the *Chester* continuously turned toward the *Oceanic*, so as to constantly head toward her bridge, and in the face of this conduct on the part of the *Chester*, the captain of the *Oceanic* chose to rely on a promise that he saw was not being kept, and remained supine and inactive until he saw a collision was inevitable. According to his own evidence, the measures which he finally did adopt were not taken to avoid *risk of collision*, or even to avert the collision, but merely to mitigate to some degree the consequences of that which, through his failure to seasonably adopt proper measures to prevent it, had become a certainty. “I simply
“waited developments, in order to give the necessary

“orders if she struck the *Oceanic* or got across our
“bows” (p. 103).

For convenience of the Court we list here some of
the authorities upon which we rely :

- The Phœnix*, 58 Fed. Rep. 927.
The John H. May, 52 Fed. Rep. 883.
The Locklibo, 3 Rob. Ad. 318.
Union SS. Co. vs. N. Y. SS. Co., 24 How. U. S.
 313.
Taylor vs. Harwood, 1 Taney, 444.
The Senff, 32 Fed. Rep. 237.
The Clara, 49 Fed. Rep. 768.
The Titan, 49 Fed. Rep. 479.
The Aurania, 29 Fed. Rep. 124.
The Ogemaw, 32 Fed. Rep. 922.
The Galileo, 28 Fed. Rep. 473.
The Minnie C. Taylor, 52 Fed. Rep. 323.
The Beryl, L. R. 9 Prob. Div. 137.
The Dordogne, L. R. 10 Prob. Div. 6.
The Stanmore, L. R. 10 Prob. Div. 135.
The Khedive. L. R. 5 App. Cases 876.
The Manitoba, 122 U. S. 108.
The Ceto, L. R. 14 App. Cases 688.
The Bristol, 11 Fed. Rep. 156.
The America, 92 U. S. 432.
Ward vs. Ogdensburg, 5 McLean, 622.
The Britannia, 34 Fed. Rep. 555.
The Arratoon Apar, L. R. 15 App. Cases 37.
Little vs. Hackett, 116 U. S. 366.

- The Bernina*, L. R. 12 Prob. Div. 58.
Sherlock vs. Alling, 93 U. S. 99.
The Louise, 52 Fed. Rep. 885.
The Virginia, 49 Fed. Rep. 84.
The Francis, 44 Fed. Rep. 510.
The Fred Jensen, 49 Fed. Rep. 254.
The Intrepid, 48 Fed. Rep. 323.
The Atlas, 93 U. S. 302.
The John S. Darcy, 29 Fed. Rep. 644.
The Breakwater, 39 Fed. Rep. 511.
The A. Crossman, 58 Fed. Rep. 808.
The Martello vs. The Willey, 14 Sup. Ct. Rep. 723, 1894.
The Magna Charta, 25 Law Times (London) N. S. 512.
The Raleigh, 31 Fed. Rep. 527.
The Luray, 24 Fed. Rep. 751.
The Martello, 34 Fed. Rep. 71.
Leonard vs. Whitwell, 10 Com. C. C. 638.
The North Star, 62 Fed. Rep. 71.

The case of *The Khedive*, L. R. 5 Ap. cas. 876, is more nearly on all fours with the present case than any other cited by either side. An examination of the cases cited by appellant will disclose that they are not in conflict with what we contend for. In order to determine what is adjudged in any case the case should be viewed as an entirety—not judged of by some general expression contained in the opinion.

We confidently submit that upon the facts and law of these cases the decrees of the District Court should be affirmed.

CLINTON L. WHITE AND
WILLIAM H. COBB,

Proctors for Appellees.

October, 1894.

